**IN THE HIGH COURT OF UTTARANCHAL**
**AT NAINITAL**

Second Appeal No. 844 of 2001
(Old No. 280 of 1988)

1. Municipal Board, Nainital
2. Executive Officer
Municipal Board, Nainital ... Appellants

Vs

Sewa Samiti, Mallital, Nainital ... Respondent

Sri Anil Dabral holding brief of Sri D.S. Patni, learned counsel for the appellants
Sri Siddhartha Shah, learned counsel for the respondent

**Hon'ble B.C. Kandpal, J.**

This second appeal has been preferred against the judgment and decree dated 16.06.1988 passed by Special Judge (Additional District Judge), Nainital in Civil Appeal No. 53 of 1986 arising out of judgment and decree dated 28.06.1986 passed by Civil Judge, Nainital whereby the suit of the plaintiff/respondent is decreed with costs.

2. Brief facts of the case are that the respondent is a registered Society and is a religious and a charitable institution formed at Nainital. The said Society runs a Dharamshala known as '*Sewa Samiti Dharamshala, Mallital, Nainital.*' This Dharamshala has been assessed for the Municipal Taxes for the first time in 1982 for the assessment year 1982-83. The Municipal Board, Nainital issued bill for the years 1982-83, 1983-84 on account of scavenging taxes, which was accordingly paid by the respondent – Sewa Samiti. Prior to 1982-83, neither the scavenging facilities were available nor was there any demand from the Board. Hence there was no need or question of payment of the said dues to the Municipal Board, Nainital. The Municipal Board, Nainital is not entitled to demand scavenging tax from the respondent under the provisions of law and its demand is clearly without jurisdiction and in utter disregard of provisions of statute and is clearly arbitrary and unreasonable without jurisdiction. The

Municipal Board is also trying to release house tax and water tax from the Sewa Samiti for the year prior to 1982 and have demanded Rs. 5,391.50 by getting a citation issued through Collector, Nainital. The Sewa Samiti filed an objection on 10.09.1984 before the Executive Officer, Municipal Board, Nainital stating therein that the assessment had not been taken prior to 1982. The said citation and demand are clearly without jurisdiction and are arbitrary, illegal, unreasonable and not warranted under the provisions of the U.P. Municipalities Act but no heed was paid to his objection. Therefore the respondent filed a suit before the Civil Judge, Nainital.

3. The Municipal Board contested the suit and filed its written statement. They have pleaded in written statement that the respondent has no case for the grant of injunction and the suit is not maintainable. It has been brought to the notice of the Secretary that the total valuation of rented building came to Rs. 2,840/-, but the Prabhari Adhikari liberally for the purpose of assessment valued it at Rs. 2,500/- against the assessment of the building there is a provision of appeal under Section 160 of the U.P. Municipalities Act and the appeal lies to the Chief Judicial Magistrate. The suit was barred by Section 41 of the Specific Relief Act.

4. On the pleadings of both the parties, the court below framed following issues:-

1. Whether the plaintiff is entitled to permanent injunction restraining the defendants from recovering or realizing Municipal Taxes for the period prior to 01.04.1982?
2. Whether the suit is barred for want of a notice under Section 326 of the U.P. Municipalities Act? If so, its effect?

3. Whether the plaintiff is entitled to special costs?
4. Whether the suit is maintainable?
5. To what relief, if any, is the plaintiff entitled?

5. Learned Civil Judge, Nainital after having heard the learned counsel for the parties and perusing the entire material available on record allowed the suit with costs vide judgment and decree dated 01.04.1982.

6. Feeling aggrieved by the aforesaid judgment and decree, the Municipal Board preferred an first appeal before the Special Judge (Additional District Judge), Nainital which was dismissed vide judgment and decree dated 16.06.1988.

7. Aggrieved by the aforesaid judgments and decree passed by the courts below, the Municipal Board preferred this second appeal before the Allahabad High Court, which has been transferred to this Court after creation of new State.

8. Heard Sri Anil Dabral holding brief of Sri D.S. Patni, learned counsel for the appellants, Sri Siddharth Sah, learned counsel for the respondent and perused the record.

9. Learned counsel for the appellant has argued that before filing the suit the respondent was required to send a notice under Section 326 of the Municipalities Act to the appellant but he did not do so. Therefore, the suit is not maintainable. In order to appreciate the arguments it is desirable to go through the Section 326 of Municipalities Act which runs as under:-

"326 **Suits against Municipality or its officers –**

1) No suit shall be instituted against a Municipality or against a member, officer or servant of a Municipality, in respect of an act done or purporting to have been done in its or

his official capacity, until the expiration of two months next after notice in writing has been, in the case of a Municipality, left at its office, and in case a member, officer or servant, delivered to him or left at his office or place of abode, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and the plaint shall contain a statement that such notice has been so delivered or left.

2) If the Municipality, member, officer or servant shall before action is commenced, have tendered sufficient amends to the plaintiff, the plaintiff shall not recover any sum of excess of the amount so tendered, shall also pay all costs incurred by the defendant after such tender.

3) No action such as is described in sub-section (1) shall, unless it is an action for the recovery immovable property or for a declaration of title thereto, be commenced otherwise that within six months next after the accrual of the cause of action.

4) Provided that nothing in sub-section (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceedings."

10. From perusal of aforesaid Section, it is clear that before filing suit against Municipal Board a notice under Section 326 of the Municipalities Act should be given but sub-

clause (4) of this Act says that it is not necessary to give notice under Section 326 of the Municipalities Act.

11. Secondly, learned counsel for the appellant has argued that the respondent has not filed a copy of rules and regulations of the Society. Therefore, the suit is not maintainable under Section 88 of the Societies Registration Act, 1960.

12. I do not find any force in this argument, as the appellants did not raise this point before the lower court as well as in the written statement filed by them.

13. Learned courts below after having heard learned counsel for the parties and after having perusing the entire evidence available on record came to the conclusion that the appellants are restrained from realizing the taxes prior to the period of 01.04.1982. I do not find any ground for interference in the concurrent findings of fact recorded by the courts below. It is well settled law that how so erroneous may be the findings of fact, the same cannot be interfered with in the second appeal. Moreover, no substantial question of law is involved in this case.

14. The second appeal lacks merit and is liable to be dismissed.

15. Accordingly, the second appeal is dismissed in-limine.

**(B.C. Kandpal, J.)**

25.09.2006
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